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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

LIPTON & MARGOLIN, APC., Plaintiff and Respondent, v. ANDREW KO, Defendant and Appellant.	B288038 (Los Angeles County Super. Ct. No. EC061572)

APPEAL from an order of the Superior Court of Los Angeles County. Ralph C. Hofer, Judge. Affirmed.

James Ellis Arden, North Hollywood, for Defendant and Appellant.

Keith A. Bregman, Encino, for Plaintiff and Respondent.

* * * * * *

A law firm sued its former client for unpaid attorney fees, and the client countersued for malpractice. Both sets of claims went to arbitration and neither party prevailed on its claims. After the client successfully moved to have the arbitrator's ruling confirmed, he sought over $15,000 in costs. The trial court awarded him $60. The client now appeals the trial court's order compelling arbitration as well as its ruling on costs. We conclude that we lack jurisdiction over the former, and that the client has failed to establish error as to the latter. Accordingly, we affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In January 2008, Andrew Ko's (Ko) wife filed for dissolution of her marriage.

A few months later, Ko hired the law firm of Lipton & Margolin, APC (the firm) to represent him in the dissolution proceedings. In hiring the firm, Ko executed a (1) retainer agreement, and (2) a one-page arbitration agreement applicable to "any dispute as to legal malpractice." Among other things, the arbitration agreement specified how the arbitrators would be selected: Each party would select one arbitrator and those two arbitrators would mutually select a third, and "[e]ach party shall be responsible for the expense of the arbitrator designated by them and shall be jointly responsible for the [third] arbitrator . . . *These costs shall be non-recoverable*." (Italics added.) The arbitration agreement also specified that "[a] determination of the merits shall be rendered in accordance with the laws of the State of California, which shall apply to the same extent as if the dispute were pending before a superior court . . . *These expenses shall be non-recoverable cost*. [sic]." (Italics added.)

The firm represented Ko through 2012.

II. Procedural Background

A. *Lawsuits*

In November 2013, the firm sued Ko for an unpaid balance of $39,455.45 in attorney fees and costs, plus interest.

In March 2014, Ko counter-complained against the firm and two of its lawyers for breach of contract, legal malpractice, constructive fraud and an accounting.

B. *Initial litigation over arbitration*

In mid-2014, the firm moved to compel arbitration of Ko's counterclaims pursuant to the arbitration agreement. After a full round of briefing as well as supplemental briefing, the trial court granted the motion to compel arbitration in October 2014. The parties subsequently agreed also to submit *both* the firm's claims as well as Ko's counterclaims to a single arbitrator.

C. *Ko's 998 offer to compromise*

On September 22, 2015, Ko made a formal offer to compromise under Civil Procedure Code section 998 (the 998 offer),[1] in which he offered to dismiss his countercomplaint and to settle the firm's complaint for $1,800. The firm did not accept Ko's offer, and it expired.

D. *Arbitration proceedings*

At some point prior to September 2016, the arbitrator granted summary judgment to the firm on all of Ko's counterclaims after finding them to be time barred.

The arbitrator held an evidentiary hearing on the firm's claims in September 2016. The arbitrator issued his ruling in April 2017. The arbitrator ruled for Ko, concluding that the firm

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1 All further statutory references are to the Civil Procedure Code unless otherwise indicated.

had not met its burden of proving any nonpayment of fees. The arbitrator awarded the firm $435 in costs (for filing its answer to Ko's failed cross-complaint), but otherwise ruled that "each party shall bear its own costs and fees."

E. *Post-arbitration judicial proceedings*

1. *Petition to confirm*

Ko filed a petition to confirm the arbitrator's award; in the form petition, Ko checked the box seeking "costs of suit." The firm opposed the petition solely on the ground that there was no basis to award costs. Ko responded that "[n]o costs have yet been claimed."

The trial court granted the petition to confirm on June 23, 2017. The court entered judgment the same day.

2. *Memorandum of costs*

Exactly two weeks after judgment was entered, Ko filed a memorandum of costs. Ko sought a total of $15,161.06 in costs, comprised of $979.11 in transcript costs, $504.75 in filing fees, $27.20 for service of process, and $13,650 for unspecified "contractual arbitration expenses."[2] The memorandum did not list section 998 as a basis for awarding any of these costs.

The firm filed a motion to tax these costs.

After full briefing in which Ko asserted section 998 as a basis to recover costs, the trial court issued an order on December 8, 2017 granting the motion in part and denying it in part. The court granted Ko's request for $60 in filing fees (rather than the

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2 Ko's initial memorandum of costs sought unspecified "contractual arbitrator expenses" of $27,300 and $979.11 in deposition costs, but Ko subsequently halved the arbitration expenses and changed the basis for the $979.11 to transcript costs.

full $504.75 requested by Ko) for the sole court filing made *after* the arbitration concluded—namely, Ko's petition to confirm. The court denied Ko's requests for all other costs, reasoning that (1) Ko was not entitled, under the general cost statutes, to recover for his pre-arbitration costs because he had waived his right to those costs in the arbitration agreement, and (2) Ko had not established his right under section 998 to recover his post-offer costs because (a) Ko never asked the arbitrator for those costs, (b) Ko had "expressly agreed" all costs were non-recoverable, and (c) Ko did not "submit[] [any] invoices or other evidence showing when [those] costs were incurred," thereby failing to prove the costs he sought were incurred *after* the 998 offer.

F. *Appeal*

On February 5, 2018, Ko filed a notice of appeal purporting to appeal from "the . . . order . . . entered on . . . December 8, 2017."

DISCUSSION

In this appeal, Ko purports to appeal the trial court's (1) order compelling arbitration, and (2) order regarding costs.

I. Order Compelling Arbitration

Ko complains at length that it was error for the trial court to grant the firm's motion to compel arbitration, but at the same time disclaims that the error prejudiced him. We need not plumb these seemingly inconsistent positions because we lack jurisdiction to consider any appeal of the order compelling arbitration. We independently examine our own jurisdiction (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 252), and our examination reveals two reasons why we lack jurisdiction.

First, Ko's appeal of the order compelling arbitration is untimely. An order granting a motion to compel arbitration is not immediately appealable, but is instead "subject to . . . appeal from the final judgment." (*Fagelbaum & Heller LLP v. Smylie* (2009) 174 Cal.App.4th 1351, 1359-1360; § 1294, subd. (d) ["An aggrieved party may appeal from . . . [a] judgment entered pursuant to this title."].) In this case, judgment was entered on June 23, 2017. Thus, Ko had at most 180 days to file a notice of appeal. (§ 1294.2 [appeals from judgment confirming arbitration awards "shall be taken in the same manner as an appeal from an order or judgment in a civil action"]; Cal. Rules of Court, rule 8.104(a) [noting that latest time to file notice of appeal is "180 days after entry of judgment"].) Ko filed his notice of appeal on February 5, 2018, which is 227 days after judgment was entered. Accordingly, his notice of appeal was untimely as to the order to compel arbitration. This deficiency deprives us of jurisdiction. (*Bourhis v. Lord* (2013) 56 Cal.4th 320, 329 ["filing a timely notice of appeal is a jurisdictional requirement"].)

Second, Ko did not list the order compelling arbitration in his notice of appeal. Although notices of appeal are to be construed liberally, that maxim does not apply where, as here, the appellant has specified which order(s) he is appealing; in such instances, orders not specified are not part of the appeal. (*Roth v. Parker* (1997) 57 Cal.App.4th 542, 551; *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 239.) Ko's notice of appeal expressly stated that Ko was appealing the December 8, 2017 order (regarding costs), and nowhere listed the June 23, 2017 judgment (regarding, among other things, the order compelling arbitration).

We are accordingly without jurisdiction to consider Ko's myriad attacks on the order compelling arbitration, including his assertions that the arbitration agreement was unconscionable.

II. Order Regarding Costs

A. *Costs under general cost statutes*

Ko asserts that he prevailed in the firm's lawsuit against him, and is accordingly entitled to recover the costs as a "prevailing party." We review a trial court's ruling denying costs for an abuse of discretion, but review any related legal questions de novo. (*LAOSD Asbestos Cases* (2018) 25 Cal.App.5th 1116, 1123 (*LAOSD Asbestos Cases*).)

1. *Costs incurred during the arbitration*

Section 1284.2 erects a default rule that each party to an arbitration shall split all costs mutually incurred during the arbitration and shall otherwise bear their own costs incurred during the arbitration. (§ 1284.2; *DiMarco v. Chaney* (1995) 31 Cal.App.4th 1809, 1817 (*DiMarco*) ["section 1284.2 pertains to costs incurred in the underlying arbitration proceeding"].) This default rule may be modified by the parties. (§ 1284.2 [default rule does not apply where "the arbitration agreement otherwise provides or the parties to the arbitration otherwise agree"].) In this case, Ko and the firm expressly adopted section 1284.2's "pay your own freight" rule because their arbitration agreement provides that the arbitrators' fees as well as other expenses incurred during the arbitration shall be "non-recoverable." The trial court did not abuse its discretion in adhering to the terms of the parties' contract.

Ko resists this conclusion with two arguments. First, he asserts that he cannot waive his right to recover costs under the above cited statutes because they are laws "established for a

public reason [that] cannot be contravened by a private agreement." (Civ. Code, § 3513; see generally *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 382-383.) This assertion lacks merit because the plain text of section 1284.2 expressly preserves the right of parties, "by a private agreement," to adopt a different arrangement for allocating costs. We decline to curtail the freedom of contract that our Legislature specifically conferred in this statute. Second, Ko contends that the arbitration agreement's provision for allocating costs is unconscionable. This contention lacks merit because we cannot reach the issue of unconscionability (for it is inseparable from the merits of Ko's attack on the motion to compel arbitration over which we lack jurisdiction) and because invalidating the cost-splitting provision of the arbitration agreement will have no effect (for section 1284.2 would apply in its absence and would dictate the same outcome).

2. *Costs incurred during judicial proceedings*

Section 1293.2 provides that a trial court shall award costs incurred during "any judicial proceeding" attendant to an arbitration pursuant to the general cost statutes. (§ 1293.2; see generally § 1032 et seq.)

Applying this provision, the trial court properly awarded Ko the court filing fee he incurred in filing his post-arbitration motion to confirm the arbitration award. The trial court also properly denied Ko any costs he incurred in the judicial proceedings that preceded the arbitration. By virtue of the arbitrator's ruling awarding the firm its filing fee for its pre-arbitration answer to Ko's countercomplaint, we must infer that the issue of assigning costs incurred in judicial proceedings prior to the arbitration was within the scope of the arbitrator's

authority. Yet Ko provides no evidence that he asked the arbitrator for the costs *he* incurred in pre-arbitration judicial proceedings. Ko's failure to do so is fatal to his ability to seek relief following confirmation of the award. (*Maaso v. Signer* (2012) 203 Cal.App.4th 362, 378 [a party's "failure to request the arbitrator to determine a particular issue within the scope of the arbitration is not a basis for vacating or correcting an award"].) In light of this conclusion, we have no occasion to reach Ko's alternative argument that "equity" compelled the trial court to issue a different cost award.

B. *Costs under section 998*

Ko asserts that he made a 998 offer to pay the firm $1,800 to settle its lawsuit against him, that Ko subsequently obtained "a more favorable . . . award" when the arbitrator ruled that the firm was entitled to nothing, and that Ko is entitled to recover his "costs from the time of the [998] offer" forward pursuant to section 998, subdivision (c)(1). We review a trial court's ruling denying costs under section 998 for an abuse of discretion (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262), but review any related legal questions de novo (*LAOSD Asbestos Cases*, *supra*, 25 Cal.App.5th at p. 1123).

Section 998 provides that when a defendant makes a 998 offer and the plaintiff subsequently "fails to obtain a more favorable . . . award," the plaintiff "shall pay the defendant's costs from the time of the offer" forward. (§ 998, subd. (c)(1).) Section 998 applies to post-offer costs whether they are incurred in an arbitration proceeding or in the judicial proceedings that preceded or followed the arbitration; in this respect, section 998 effectively operates as an exception to section 1284.2 and the general cost statutes. (*Heimlich v. Shivji* (2017) 12 Cal.App.5th

152, 160 ["Section 998 is understood to be an exception to section 1032."], review granted Aug. 23, 2017, S243029; *Pilimai v. Farmers Ins. Exchange Co.* (2006) 39 Cal.4th 133, 149-150 [same, as to section 1284.2].)

Applying this provision, Ko (in his capacity as a defendant in the firm's lawsuit against him) would at first blush seem to be entitled to have the firm (as the plaintiff) pay his post-offer costs.[3] Ko's claim nevertheless fails for two independent reasons.

First, Ko never presented his request for post-offer costs under section 998 to the arbitrator. Doing so is required at some point prior to seeking confirmation of the arbitrator's award, chiefly because the arbitrator is "best situated" to evaluate that request. (*DiMarco*, *supra*, 31 Cal.App.4th at p. 1816; *Maaso*, *supra*, 203 Cal.App.4th at pp. 377-378; accord, *Heimlich*, *supra*, 12 Cal.App.5th at pp. 173-174 [re-presentation of 998 cost request not necessary when arbitrator has refused to entertain such a request].) Nothing in the record shows that Ko took this necessary step.

Ko offers two reasons why he was excused from presenting his request for post-offer costs under section 998 to the arbitrator.

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3 We recognize that Ko is also a *plaintiff* with respect to his own countercomplaint, but his "dual status" as a plaintiff and defendant adds nothing to the pertinent analysis. That is because, even if we assumed he prevailed in this dual status, a plaintiff who obtains a more favorable award than his 998 offer is only entitled to (1) his costs under the general cost statutes, and (2) the "postoffer costs *of the services of expert witnesses*." (§ 998, subd. (d), italics added.) As explained above, Ko obtained the costs to which he is entitled under the general cost statutes, and he did not seek any costs pertaining to expert witnesses.

He asserts that section 998, subdivision (b)(2) precluded him from introducing his 998 offer "in evidence" during the arbitration proceeding. However, *Heimlich* ruled that parties seeking section 998 costs following an arbitration should still apply to the arbitrator for those costs but do so after the arbitration proceeding but before filing a petition to confirm. (*Heimlich*, *supra*, 12 Cal.App.5th at pp. 173-174.) *Heimlich* is pending before our Supreme Court, see S243029, but *Heimlich* is persuasive authority until overturned. Ko further asserts that the arbitration agreement's provisions making costs "non-recoverable" precluded him from seeking 998 offer-based fees during the arbitration. However, the agreement speaks to the "costs" of the arbitrators as well as the "expenses" involved in "determin[ing] . . . the merits" during arbitration; it does not speak to post-offer costs under section 998. We will not presume a prohibition against *all* costs from the agreement's silence on this point.

Second, Ko did not carry his burden of proving that the costs he seeks to recover were incurred *after* his 998 offer. This is critical because post-offer costs are the only costs to which he is entitled. (§ 998, subd. (c)(1).) As the trial court noted, Ko did not "submit[] [any] invoices or other evidence showing when [those] costs were incurred." This is a complete failure of proof, and on this record, the trial court acted within its discretion in denying any 998 costs. On appeal, Ko urges that the arbitration hearing occurred in September 2016, so the unspecified "contractual arbitration expenses" must have been incurred after his 998 offer in September 2015. But we have no idea what those unspecified expenses are, and thus no idea when they were incurred. The arbitrator may have conducted the hearing in September 2016,

but Ko offers no evidence that the arbitrator was paid at that time rather than by a retainer in advance. The same is true for the other costs Ko seeks. As the appellant, Ko bears the burden of "affirmatively . . . show[ing] error" (*Vaughn v. Jonas* (1948) 31 Cal.2d 586, 601), and he has not pointed to any evidence in the record demonstrating such error.

Our conclusion on these two points renders it unnecessary for us to address the trial court's third reason for denying any 998 cost award—namely, whether the arbitration agreement validly waived recovery of any such costs.

DISPOSITION

The order denying costs is affirmed. The firm is entitled to its costs on appeal.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ